

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

In a Matter Between:)	
)	
GREENBRIER VMC, LLC, d/b/a)	
GREENBRIER VALLEY MEDICAL)	
CENTER)	
Respondent,)	Case 10-CA-094646
)	
and)	
)	
NATIONAL NURSES ORGANIZING)	
COMMITTEE (NNOC),)	
)	
Charging Party.)	
)	

CHARGING PARTY
NATIONAL NURSES ORGANIZING COMMITTEE'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, National Nurses Organizing Committee/NNOC (the "Union"), herewith files its Answering Brief to the Exceptions filed by Greenbrier Valley Medical Center ("Respondent") to the Decision of the Administrative Law Judge. Contrary to Respondent's assertions, the Administrative Law Judge (the "ALJ" or "Judge") correctly concluded on this record that Respondent violated Sections 8(a)(1) and (3) of the Act. The Board should affirm the rulings, credibility determinations, findings, conclusions of law and remedial order in the Judge's Administrative Law Judges Decision ("ALJD").

Contrary to Respondent's arguments in its Brief in Support of Exceptions, the Judge correctly found that Respondent's actions towards Registered Nurse (RN) Jim Blankinship were motivated by anti-union animus. Rather than "advocacy," as Respondent labels the ALJD, the decision is complete with detailed factual findings, credibility resolutions, and thorough analysis to support the Judge's determinations. Respondent discriminated against Blankinship, just days after he announced to management his intention to serve as a representative for the newly certified Union, for reasons that cannot withstand scrutiny. Despite the RNs having selected the Union as their collective bargaining representative, Respondent has attempted to achieve the same union-free environment that it had prior to the election. Indeed, Respondent has refused to recognize and bargain with the Union, which has led to a Section 8(a)(5) complaint, pending before the Board in Case 10-CA-093065.

As the record evidence and the ALJD reflects, Blankinship was simultaneously issued written discipline and placed on a PIP that threatened his job security, had his schedule changed, and had the performance improvement plan unjustly extended, because he had the audacity to

volunteer to serve as an RN Union representative. Respondent was not going to have anything to do with the Union, it made clear to Blankinship when he let his manager, Emergency Services Director Connie Rose, know that he would be serving as a Union representative. She immediately told him Respondent was not recognizing the Union and that employees had no *Weingarten*¹ rights.

As there was no legitimate justification for the extreme measure of the PIP (only one other PIP had been issued since January 1, 2010, to an RN who eventually was terminated for far greater alleged misconduct), or the written discipline, Respondent instead chose to rely on five unrelated incidents that had transpired over the prior weeks to provide the basis for Blankinship's PIP, which the Judge objectively analyzed. These events included alleged offenses as specious as asking a medical care question out loud, casually voicing an incorrect (but reasonable) observation, and entering the wrong patient's room momentarily in a busy Emergency Room. As the record reveals, Respondent also acted in a manner inconsistent with its own progressive discipline policy and engaged in blatant disparate treatment with regard to Blankinship.

Finally, to the extent Respondent excepts to the Judge's finding that Respondent violated the Act by its issuance of written discipline, along with the PIP, the Judge clearly articulated his sound reasoning for also finding a Section 8(a)(3) with regard to the written warning. ALJD at 12, fn. 16.

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¹ *NLRB v. Weingarten, Inc.*, 420 U.S. 25 (1975).

II. STATEMENT OF FACTS²

A. Respondent's Exceptions Regarding Blankinship's Union Activity

The RNs employed by Respondent began to organize with the Union in mid to late July, 2012. Tr. 32. The Board certified the Union as the RNs' collective bargaining representative on September 25, 2012. Tr. 33-34; GC Exh. 4. In October and November, a series of Union meetings were convened off-site, in part to choose Union representatives for each department of the hospital. Tr. 36; Tr. 134. Blankinship, a nurse of 15 years, had been employed by Respondent for the last five years in the Emergency Department. Tr. 132. He was in attendance at the Union meeting held on November 9, 2012, and volunteered to serve as the Union representative in his department. Tr. 134. Union Representative Celia Cody provided Blankinship with a letter addressed to the supervisor of the Emergency Department, Constance Rose. The letter explained that Mr. Blankinship, as well as two other nurses in the department, would each be serving as "Nurse Representatives of the NNOC" in their department. GC Exh. 2. Mr. Blankinship agreed to collect the signatures from the two other volunteers and deliver this document to Emergency Services Director Rose. Tr. 134. Over the next few weeks RN Blankinship collected the signatures from his fellow nurse representatives, signed it himself, and then delivered the letter to Emergency Services Director Rose on November 29, 2012. Tr. 137.

On November 29, 2012, Blankinship approached Rose to explain that he, along with the two other Nurse Representatives, would be serving as Union representatives in the department. *Id.* Blankinship described in un rebutted testimony how Rose became visibly upset with him, "threw her hands up" and refused to accept the letter designating the RN Union representatives.

² "Tr. ____" refers to the pages of the transcript of the hearing in this matter. "GC Exh." refers to General Counsel's Exhibits. "R Exh." refers to Respondent's Exhibits. "U Exh." refers to the Union's Exhibits. "ALJ Exh." refers to Administrative Law Judge Exhibits. "ALJD" refers to the Administrative Law Decision.

Tr. 138. As Blankinship's rebutted testimony sets forth, Emergency Services Director Rose stated:

I don't have to take [the letter naming the RN Union representatives], my employer says that we do not recognize the Union here, and I'm not taking this, and I said, it's only—the only reason or the only thing—involvement I have is if another employee wants a witness with a meeting with management, and I would be required to be there. And she said I know you're talking about Weingarten, but we're not going to do that. We don't recognize the Union here. At that point I say, okay, I guess that's that, and I picked it up, and I started walking out the door. She said wait a minute, let me have that, I need the names off of it, and she said you might get it back. And I left. Tr. 138-139.

Blankinship left the meeting with Emergency Services Director Rose and promptly sent an email to the Union staff contact, explaining what had happened, and resigning from his position as a Nurse Representative. Tr. 139; GC Exh. 3. He explained that Rose had become upset with him and how he had never had a problem with her in his five years of working for her. GC Exh. 3.

B. Respondent's Exceptions Regarding Its Issuance of a PIP and Written Discipline to RN Blankinship

In the days following Blankinship announcing he would serve as Union representative, Emergency Services Director Rose began reviewing Blankinship's recent work record and documenting errors to discipline him retroactively and issue his PIP. Tr. 401-05; R Exh. 9. She developed a list of five incidents that had transpired over the course of the prior month, and drafted the discipline and PIP without interviewing Blankinship or any other employee present for nearly any of the incidents. Tr. 473-76. She compiled no documentation during the course of her "investigation." Tr. 473. Rose drafted the written discipline and PIP and discussed issuing it with the Human Resources Department (Tr. 403), all prior to calling Blankinship into her office to be issued the discipline. Tr. 450. At no time during the course of this "investigation" and

preparation of the written discipline and PIP was Blankinship even made aware that he was under investigation. Tr. 473-76. In fact, in the weeks that had passed since some of the alleged incidents serving as the basis for this discipline, no Respondent agent had contacted Blankinship or even suggested that these occurrences could warrant a discipline. *Id.*

On December 6, 2012, Rose called Blankinship into her office and gave him an “Employee Counseling/Disciplinary Action Notice” written warning. GC Exh. 5.³ Under the explanation of the offense, the five incidents (discussed in further detail *infra*), were listed as the basis for the corrective action—written discipline/placing Blankinship on a PIP and changing his schedule. *Id.* On the back of the documents it explained that failure to improve could result in being placed in a 30-day final warning period which could result in his termination. *Id.* The form further stated that his performance would be reviewed in 30 days.⁴

The five incidents serving as a basis for the discipline were listed as follows:⁵

1. One actual medication error – wrong med
2. Near miss to wrong person (regarding a potential medication error)
3. Has exhibited questions regarding drugs on intubation – not new procedure and standard for ED nurse
4. Also called pacer spikes a chemical reaction
5. Discharged patient with low blood pressure, did not notify Physician.

The subsequent page was titled “Performance Improvement Plan” and listed the specific goals and objectives for Mr. Blankinship to complete, including:⁶

³ This discipline, issued with the PIP, exhaustively litigated, is the subject of Respondent’s exception that this discipline was not alleged in the complaint and should be dismissed. Correctly, the Judge concluded that “[t]he Hospital’s assertion that the complaint did not cover the written warning is unreasonable.” ALJD at 12, fn. 16.

⁴ Rose testified that despite the form reading “30 days,” the original PIP was to be for a period of 90 days. Tr. 401. Regardless, no follow-up was conducted until April 16, 2013. This date is 131 days after the December 6 meeting.

⁵ These items were not numbered and were handwritten onto the form utilizing shorthand. GC Exh. 5, p. 1.

1. Taking the order sheet to patient rooms
2. Passing a proficiency test on intubation drugs
3. Passing a Telemetry course on ALC (Alternate Level of Care)
4. Timely documentation, pertinent on 90% record.

Below this the document indicated that “Training or Special Direction to be Provided:” included:

1. Pharmacy to do med passes
2. K. Little to instruct on intubation.

Prior to being issued the written discipline and PIP,⁷ Blankinship had been issued only one other formal discipline in his five years of employment with Respondent. Tr. 507. The prior discipline, dating from 2011, pertained to an unrelated matter (concerning the use of restraints). R Exh. 8. The record contains the annual employee evaluations for Blankinship for the years 2010 (U Exh. 5), 2011 (U Exh. 4), and 2012 (R Exh. 5). For the overwhelming majority of categories upon which RN Blankinship was evaluated, he scored “Meets job requirements” or “Exceeds requirements.” For “Standards of Safety,” and not once did he score below “Meets job requirements.”

RN Blankinship completed all the requirements of his PIP, many of which were actually activities he otherwise would have had to complete anyway. (He simply took the same Telemetry test twice). Tr. 177. (All employees were required to do “med passes” with the pharmacist. Tr. 240.) On April 16, 2013, Blankinship was called into Emergency Services Director Rose’s office again to discuss his progress on the PIP. Tr. 178. This meeting was the first time he had “heard anything about [the PIP]” since December 6, 2012, more than four months earlier. Tr. 243. Ms. Rose extended the PIP by an additional 30 days, due primarily to alleged deficiencies regarding charting (the documentation required by nurses on each patient,

⁶ *Id.* p. 2.

⁷ Respondent has contended that the Performance Improvement Plan does not constitute a disciplinary action. See e.g. Tr. 437. However, the discipline policy discussed *infra* clearly indicates a PIP is a type of discipline. GC Exh. 11.

even though documentation did not form the basis of any discipline issued to Blankinship). Tr. 244-45. Following this meeting, Rose did not once speak to Blankinship regarding the PIP. When asked at hearing if he was still on a PIP, Blankinship responded “I have absolutely no idea.” Tr. 245.

Respondent maintains an official disciplinary policy. GC Exh. 11. This policy explains that all disciplinary practices shall be administered in a “fair and consistent manner.” *Id.* at §2. It also outlines a progressive discipline policy. *Id.* at §3; Tr. 473. A Performance Improvement Plan is outlined in the policy as a form of discipline. Tr. 438; GC Exh. 11 §8. Numerous examples of disciplinary actions taken in the last two years were entered into evidence (U Exhs. 6 and 7), along with the sole other example of a Performance Improvement Plan that was issued to an employee since 2010. Tr. 471 (stipulated on the record).

C. Respondent’s Exceptions Regarding the Events Serving as the Basis for the PIP and Written Discipline

Testimony was offered on each of the five specific events that served as the basis for discipline. They are discussed in detail below.

1. Medication Error

On November 14, 2012, Blankinship was working in the Emergency Department on a busy shift. Tr. 157. In performing his duties as an RN, he hung the wrong medication via an IV drip for a patient; however, he immediately noticed this mistake (in his estimation, “less than a minute” later), and corrected the situation by hanging the correct medication. Tr. 159. He followed all reporting and documentation procedures, notifying the family, the physician assistant on duty, and his supervisor. *Id.* After speaking with Emergency Services Director Rose about the incident, she volunteered to enter the occurrence report into the computer for him, as the computer would not allow him to do so. Tr. 160. Rose mentioned nothing at the time

regarding discipline, nor did she bring up this incident again until the December 6, 2012 meeting. Tr. 160. Approximately an hour after the incident transpired, the doctor actually ordered the mistaken medication to be given to the patient. Tr. 161. No harm came to the patient as a result of the error. *Id.*⁸

Thomas Flis, the director of the second and third floor nursing departments, testified that medication errors happen “from time to time.” Tr. 323. Many times medication errors are dealt with without a formal discipline, and no testimony or evidence was introduced regarding the use of a PIP for a medication error. Tr. 323-334. Flis, who worked as an RN prior to working in management, estimated he had committed three medication errors in his career, and was never issued a Performance Improvement Plan. Tr. 334.

2. “Near Miss”

At some point in November,⁹ RN Blankinship was assisting a fellow nurse who had become too busy, a common occurrence in the Emergency Department. Tr. 163. One of the patients was due to have a medication administered, and Blankinship volunteered to give the medication. *Id.* He retrieved the patient’s chart and the medication, following all protocols. *Id.*; Tr. 375. Blankinship then proceeded to the patient’s room and announced that he had their pain medication as he entered. Tr. 163. Before even approaching the patient, the patient’s mother, who was also present in the room, inquired about the medication. Mr. Blankinship immediately

⁸ Concerning the charts for the five patients involved in the five alleged incidents of alleged misconduct by Blankinship, Respondent stipulated that there is no mention in the patient charts of Blankinship, which in any regard formed the basis for his PIP. Respondent further stipulated that Respondent does not contend any negative patient outcomes resulted from Blankinship’s conduct pertaining to these patients. Tr. 257.

⁹ During the investigation conducted by the Regional NLRB office, Respondent claimed that this incident and the following incident in his discipline took place on Nov. 24 and 25, 2012. GC Exh. 7. However, they unequivocally could not have taken place on these dates because Blankinship was not at work on these dates. Tr. 162. See also GC Exh. 12.

realized he was in room 4 instead of room 5 by glancing at the chart. *Id.* He apologized and went to the correct room to administer the medication to the correct patient. *Id.*

The drug was not administered to the wrong patient. Tr. 164. No occurrence report was filed, and no paperwork documenting the incident was generated. *Id.* Rose testified that she learned of the incident because the patient's mother was a friend of another staff nurse at the hospital and mentioned the occurrence to her, who in turn re-told the story to Rose. Tr. 474. No further investigation of the incident was conducted. *Id.* Mr. Blankinship was never interviewed prior to being issued the PIP concerning this "incident," nor was anyone else. *Id.* There is no evidence in the record that any other RN has received a PIP for such an "offense."

3. Exhibited Questions During a Procedure

There is a medical procedure called a rapid sequence intubation, by which a tube is forced down the throat of a patient when the patient is unable or otherwise struggling to breathe. Tr. 378. This is often brought on due to respiratory distress or cardiac problems. Tr. 68. It is a "high-stress, high-pressure situation" with several nurses and doctors often working together on the same patient. *Id.* It is also a "common procedure" that happens "five times a week at least" in the Emergency Department. Tr. 378-79. Blankinship had performed this procedure "more times than [he] could count" in his 15 years of experience as a nurse. Tr. 166. As part of the procedure, two drugs are routinely administered – a sedative first, followed by a paralytic. Tr. 164. While this is a "basic nursing guideline" (Tr. 86), there are also occasions where "you don't give anything" because "[a]irway and life is more important than a drug." Tr. 246.

On another unidentified date in November,¹⁰ Blankinship was assisting with one of these intubation procedures. Tr. 164. In the middle of this high-pressure procedure, prior to

¹⁰ *Supra* fn. 9.

administering the drugs, Blankinship asked the doctor, “Which do you want first?” Tr. 165.

Blankinship testified:

I knew the answer as soon as I asked it. It’s one of those things where, you know, you’re busy, you’re moving fast. I was thinking out loud, and it didn’t bother me. I would rather look stupid than hurt a patient. *Id.*

The doctor responded, and the drugs were administered in their usual order. Tr. 166.

Blankinship’s question did not create any adverse medical consequence, and Blankinship did not think anything of the incident. *Id.* His supervisor who was present did not speak to him about this, and it was not brought up again until the disciplinary meeting on December 6, 2012. *Id.* Other nurses testified that it was normal to speak out loud and communicate during the procedure, and that they had never heard of anyone being disciplined for asking a question. Tr. 70, 101-106. There is no evidence that asking questions during a procedure was cause for a PIP to be issued to any other nurse.

4. Called Pacer Spikes a Chemical Reaction

On December 3, 2012, Blankinship was working in his area when one of the supervisors asked him to assist with chest compressions for a patient who needed to be revived. Tr. 167. The patient was a 350 pound male, and nurses, EMTs, and other staff were rotating in performing the compressions, as is typically done, because the procedure is physically demanding. *Id.* At some point in the procedure, when Blankinship had stepped back between his rotation, he looked at the activity on the heart monitor and said out loud that he thought that was “chemical” – a comment routinely made in similar situations. Tr. 171.

“It’s chemical” is an expression used in the profession that refers to heart activity that is solely the result of a drug like epinephrine. Tr. 170. Epinephrine functions “like a synthetic adrenaline” that sends “waves of electricity” through the heart. *Id.* In some cases, the heart

monitor will reflect these “waves of electricity [caused by the epinephrine] trying to create a contraction,” but there is no pulse. *Id.* This patient had been administered epinephrine in the field prior to being brought in to the ER. Tr. 171.

Another cause for such activity can be the use of a pacing feature on a defibrillator. Tr. 168. In this case, the pacing device is what caused the heart activity on the monitor, not the drug. *Id.* Another employee pointed this out to Blankinship following his comment, and Blankinship thought nothing of it. Tr. 171. Rose was also present during this situation, and she did not speak to Blankinship about it, nor did the doctor or anyone else. Tr. 475. It was not until the disciplinary meeting on December 6, 2012 that Blankinship learned that this remark was so noteworthy. *Id.* No other investigation was conducted. *Id.* Rose also testified that she was unable to confirm whether the monitor had its “pacer filter” turned on or not. *Id.* This filter would have helped distinguish between the causes of the kinds of activity present on the monitor. *Id.* However, as no investigation was done by Respondent, there is nothing in the record to suggest one way or the other. *Id.* There is no evidence of discipline or a PIP being issued for similar statements.

5. Discharged Patient with Low Blood Pressure

Later on December 3, 2013, Blankinship was involved in the final incident referenced on his discipline that included the PIP. Tr. 172. After a doctor had ordered the discharge of a patient, Blankinship went to her room with the chart, took her vital signs, went over the doctor’s instructions, and made sure she was in no other pain. Tr. 174. The patient’s blood pressure was low, which Blankinship noted in the chart. *Id.* However, she responded well and was “impatient” to leave. Based on the doctor’s orders, Blankinship then discharged her. *Id.*

The following day, Rose approached Blankinship and asked why he had discharged the

patient with low blood pressure. *Id.* He explained to her that it had been his understanding that the doctor had known. *Id.* Thus he had not informed the doctor, but made sure to note this information on the chart. *Id.* There was no documented verbal warning, or any indication of discipline, despite the conversation. Tr. 175, 472-73. Nothing further was said regarding this incident until the December 6, 2012 disciplinary meeting. Tr. *Id.*

D. Respondent's Exceptions Regarding the Schedule Change

The customary shifts in the Emergency Department include three day shift nurses (7am-7pm), three night shift nurses (7pm-7am), and three additional nurses, arriving at 10am, 11am, and 1pm, all working twelve hour shifts as well. Tr. 189-190; R Exh. 2 and GC Exh. 12.¹¹

Beginning with the Oct. 7, 2012 schedule, Blankinship was routinely scheduled to work day shifts, nearly exclusively. Tr. 240. See R Exh. 2. Blankinship had previously made it known that he preferred day shifts, since his hiring. Tr. 150.¹² Shortly after the new schedule with day shifts was posted, RN Blankinship and Emergency Services Director Rose had a conversation. Tr. 147. He acknowledged that he liked the new schedule to which Rose responded that she knew his preferred days. *Id.* Rae Smith, a charge nurse supervisor, whose duties included drafting the schedule, also testified to her knowledge that Mr. Blankinship “liked” day shifts. Tr. 209.

¹¹ As testified to by Charge Nurse Felicia Rae Smith. Tr. 188-190. It was also mentioned that a 3pm shift is sometimes added on weekends and holidays (Tr. 188). However, the prevailing customary shifts were described as providing for “base staffing” by Ms. Smith, who also testified that she is responsible for the schedule in the unit. Tr. 191.

¹² Additionally, Blankinship had then recently applied for a position in the outpatient surgery department. Tr. 144. One of the motivating factors for applying was that all outpatient surgery is scheduled during the day, thus providing for all day shifts. *Id.* Blankinship also testified that Rose knew of this potential transfer and his general preference for day shifts. Tr. 150. Rose deemed him eligible for transfer to this position. Tr. 481.

Rose testified that the original day shifts were offered to Blankinship because another nurse was on Paid Time Off. Tr. 428. However, copies of the schedule included in Respondent's own exhibit do not support this testimony. R Exh. 2. The schedule reflects that Blankinship was moved to days, but does not demonstrate any other regularly scheduled day shift nurse on leave. R Exh. 2. By contrast, Blankinship's schedule reflects when he was on paid time off for surgery. R Exh. 2. On December 6, upon being issued the PIP, Blankinship was also informed he would be removed from the day shift. Tr. 177. Rose stated that this was because there would be more "staff support" on the 11am shift (Tr. 177), and the Disciplinary Action Notice given to Mr. Blankinship made direct reference to this justification (GC Exh. 5) ("Move to 11a for additional staff support").

Charge Nurse Rae Smith testified that Mr. Blankinship had been "inconsistent" in his performance as a nurse when working the day shift. Tr. 212. However, when asked why he wasn't moved from day shifts earlier, if his performance was of such a concern to Respondent, Charge Nurse Smith replied that "he just needs help getting things done, and we all do on any given day" (emphasis added) Tr. 215. She further stated that she "didn't have a lot of specific issues" concerning his performance. *Id.* Charge Nurse Smith also stated that while she believed Blankinship would be more comfortable on the 11am shift, with additional "support" (Tr. 221), she readily conceded that "every nurse who has more assistance will be more comfortable". Tr. 228.

III. ARGUMENT

A. Respondent's Exceptions Regarding Credibility Resolutions

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that

they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Here, the Judge correctly found RN Blankinship to be a highly credible witness (ALJD at 4, 5 *fn.* 11) and credited him over Respondent witnesses with careful explanation for his findings (see ALJD at 9, 15 *fn.* 27). In no regard does the preponderance of all the relevant evidence lead to any conclusion that the Judge's credibility findings were incorrect, and they should, accordingly, be affirmed.

B. Respondent's Exceptions to the Findings that Its Conduct Violated Section 8(a)(3)

As set forth above, on December 6, 2012, Respondent disciplined Blankinship in the form of a PIP (and as the Judge additionally found with simultaneous written discipline), changed his schedule, and later extended the PIP measure against him. These actions were taken to retaliate against RN Blankinship for volunteering, just days earlier, to serve as a Union representative in his department. The Judge correctly found that Respondent's stated reasons for issuing the PIP (and simultaneous written discipline), schedule change, and extension of the PIP cannot withstand scrutiny under a *Wright Line*¹³ analysis.

In applying *Wright Line*, the General Counsel must make an initial showing that the employee's union support or activity was a motivating factor in the employer's decision to take adverse action against the employee. As will be set forth in more detail below, RN Blankinship engaged in Union activity, and it is un rebutted that such Union activity was known by the Employer. Anti-union animus, as well as a causal nexus between Blankinship's Union activity and the adverse actions taken against him by Respondent, are also clear in the light of Respondent's statements to Blankinship, the specious reasons proffered by Respondent for its actions, blatant disparate treatment, Respondent's deviation from its own disciplinary practices,

¹³ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

and the timing of the adverse employment actions in relation to Blankinship's Union activity. See, e.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); *Mesker Door, Inc.*, 357 NLRB No. 59 (2011); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), *enfd.* 71 Fed. Appx. 441 (5th Cir. 2003).

It is axiomatic that Blankinship was engaged in Section 7 activity when he volunteered to serve as a Union representative. Tr. 134. It is equally self-evident that the Respondent had clear knowledge of this Union activity due to Blankinship informing Respondent. Tr. 137-38. See also GC Exh. 2 (letter announcing his role). Blankinship unmistakably suffered adverse employment actions, in the form of the PIP, written discipline, schedule change, and PIP extension. GC Exh. 5.¹⁴ The Judge properly found that General Counsel established a *prima facie* case. ALJD at 12.

Respondent also had made clear its opposition to the RNs having Union representation, displaying extreme anti-union animus. As set forth above, Emergency Services Director Rose told Blankinship, when he informed her that he would serve as Union representative, that her "employer says that we do not recognize the Union here. . . . I know you're talking about Weingarten, but we're not going to do that. We don't recognize the Union here." Tr. 138-139. That the adverse actions against Blankinship were motivated by Respondent's opposition to the presence of the Union could not be stronger with such unequivocal statements by Emergency Services Director Rose.

The suspect timing of this discipline taking place only days after his announcement also draws a clear link between protected activity and the adverse employment action. The Board has long held that "where adverse action occurs shortly after an employee has engaged in protected

¹⁴ As noted, Respondent has contended that a PIP does not constitute a form of discipline. This argument is baseless and was correctly rejected by the ALJ.

activity, an inference of unlawful motive is raised.” *Sprain Brook Manor Nursing Home*, 359 NLRB No. 105 (Apr. 26, 2013) (citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002)). Moreover, the blatant disparate treatment towards Blankinship (one of only two RNs to receive a PIP since January 1, 2010) when the record is replete with other discipline issued over this time period that did not result in a PIP; Respondent’s failure to follow its own progressive discipline policy with regard to Blankinship; and its failure to conduct investigations into Blankinship’s alleged misconduct further establish that Respondent’s actions were motivated by Blankinship’s Union activity.

It is not possible for Respondent to establish under *Wright Line* that it would have taken the same adverse actions against Blankinship, irrespective of his Union activity for many of the same reasons that inform the prima facie case. Despite the fact that the hospital maintains a progressive discipline policy (GC Exh. 11), no verbal warnings, written warnings, or other actions were taken with regard to any of the “incidents” for which Blankinship was eventually issued a PIP (with a simultaneous written discipline)¹⁵ and had his schedule changed. No investigation was undertaken by Respondent to ascertain a complete understanding of the facts surrounding these events. With regard to two of the incidents, the “Near Miss” and “Exhibited Questions During a Procedure,” these were such *non-events* that Respondent had nothing more than unsubstantiated and imprecise rumors concerning Blankinship’s alleged misconduct. Had even a cursory investigation taken place, it would have at the very least revealed that Blankinship was not at work on the days the events were reported to have taken place. Compare GC Exh. 7

¹⁵ As the Judge properly found, Respondent’s contentions that the complaint did not cover the written discipline are unreasonable, as are its exceptions in this regard. ALJD at 12, fn. 16. As the Judge explained, “First, the PIP and warning were simultaneously issued by the same document, flow from the same series of events, and cannot be logically separated for substantive or remedial purposes.” See *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). *Clemson Bros.*, 290 NLRB 944, 952 (1988).

(email response to NLRB investigation) with GC Exh. 12 (schedule).

Perhaps most damning to the Respondent's defense is its failure to produce a single example of another employee being issued a PIP, let alone even disciplined, for the bulk of the types of alleged infractions described herein – specifically with regard to the second, third, and fourth allegations – the “Near Miss”, “Exhibited Questions During a Procedure”, and “Called Pacer Spike a Chemical Reaction.” Of almost 50 disciplines in the record issued to RNs by Respondent, there is not a single example related to behavior as innocuous as accidentally entering the wrong room, or asking a question out loud, or making an observation during a procedure. U Exhs. 6 and 7.

Moreover, there has only been one other case of a PIP being issued to an RN from January 1, 2010 through December 31, 2012. Tr. 471. In that one example, the nurse incorrectly triaged a patient and then left the patient unattended while “surfing the internet” despite the fact that the patient was in a state of severe pain with low blood pressure. R Exh. 4. The nurse's behavior was characterized by the attending Doctor as “substandard and unsafe,” and the PIP was only issued after the RN had already been repeatedly counseled regarding his “surfing the internet,” and having received multiple warnings concerning his behavior on prior occasions. *Id.*

Of note, is that in this sole example of another nurse being issued a PIP, Emergency Services Director Rose did in fact follow up with the employee approximately 90 days later (as stated in writing in his PIP), and had assigned specific and pertinent skill building and educational opportunities for the nurse, tailored to the incident. In the case of Blankinship, there was no follow up meeting until more than 130 days later (despite his PIP stating in writing that this would take place after 30 days), and the majority of the assigned activities and educational goals were requirements that he would have undertaken automatically and regularly as a staff

nurse, even if he had never been issued the PIP. If Respondent was truly concerned about Blankinship's performance as an RN, it would only be logical that Respondent would have been more proactive in the monitoring of the PIP. It was not truly concerned about Blankinship's performance, however, as Rose thought highly enough of Blankinship's abilities that she deemed him eligible for transfer to Day Surgery.

Nearly 50 other disciplines to RNs are included in the record for infractions ranging from excessive absences and tardiness to an example where a nurse continued distribution of medication to patients without authorization and received a documented verbal warning (after repeatedly being told to discontinue). U Ex. 6 and 7. Meanwhile, the nurse who asks a question during a procedure or walks into the wrong patient's room in a busy ER is issued written discipline with a PIP that can lead to termination because he had announced he would serve as an RN Union representative. Respondent, as noted, will have nothing to do with the Union, will not recognize the Union, will not recognize *Weingarten* rights, and will not tolerate an RN stepping forward to serve as a Union representative, as exhibited in its discriminatory actions toward RN Blankinship.

Similarly, Respondent's justifications for changing Blankinship's schedule cannot withstand scrutiny. As stated earlier, the reason given for the schedule change was that during the 11am shift, Mr. Blankinship would have more "support" from other nurses. Tr. 177. Part of the 7am shift covers hours when fewer RNs are on duty. Tr. 189. For the 7am shift, eight of the twelve hours worked include five or six RNs on duty. Six hours of the shift include full staffing with six RNs. *Id.* The 11am shift, by comparison, has six RNs for nine hours, and five RNs for three hours. *Id.* Thus there are only a few hours of the 7am shift with reduced staffing levels (three of four hours). These hours occur in the early morning. *Id.* However, there is no record

evidence that any of the alleged incidents in the December 6 discipline issued to Blankinship that formed the basis for his PIP took place during the hours of the day when there were fewer nurses on staff.

Furthermore, testimony was in fact offered (and logic would dictate) that the increasing and decreasing number of RNs corresponds to the number of patients throughout the day. Tr. 211. Thus at 7am, there are fewer RNs; however, there are fewer patients, and by contrast, at 1pm, when typically six RNs are present, there are more patients. Consequently, the hours with increased “support” correspond directly to the hours with increased patient census. This is exactly why Blankinship testified that the supposed increased levels of staff support were of no assistance to him, any more so than on other shifts. Tr. 177.

Lastly, despite Blankinship’s alleged need for “additional staff support,” the schedule change was not made effective until the end of the year—24 days into the 30-day period. Tr. 220-21. See also GC Exh. 12. Respondent argues that Blankinship’s performance as a nurse was so inconsistent and of concern as to warrant written discipline with a PIP and a schedule change, in order to provide him with “additional staff support.” Yet the staff support appears to be non-existent, and his supervisors were perfectly comfortable allowing RN Blankinship to continue to work *without the necessary staff support* that his behavior allegedly warranted, for nearly a month after being issued the discipline. It is well-settled that when an employer’s asserted reason for its actions cannot withstand scrutiny, the Board will infer an unlawful reason for the employer’s conduct. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966); *Painting Co.*, 330 NLRB 1000, 1001 fn. 8 (2000). The reasons for changing Blankinship’s schedule clearly cannot withstand scrutiny.

The same applies to the extension of Blankinship's PIP. On April 16, 2013, Respondent extended the PIP, alleging that Mr. Blankinship's documentation was still substandard. While documentation was outlined as a goal of the initial PIP, this was never an alleged infraction serving as a basis for the PIP. The Board has long held that shifting justifications for discipline demonstrate unlawful motive. See, e.g., *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007). In sum, upon learning of Blankinship's decision to serve as RN Union representative, Respondent lumped together five alleged incidents of misconduct as justification for a written discipline with a PIP, a schedule change, and subsequent extension of his PIP.

Based on the evidence in the record, the Judge correctly concluded that Respondent cannot show that it would have taken the same actions with regard to Blankinship irrespective of his Union activity. Respondent clearly does not wish to honor the RNs' choice to unionize and, upon learning of Blankinship's intention to serve as an RN Union representative, discriminated against him in violation of Section 8(a)(3).

IV. CONCLUSION

For all the foregoing reasons, the Board should overrule Respondent's Exceptions and affirm the ALJ's rulings, findings, credibility determinations and conclusions, and adopt the recommended order of the ALJ.

DATED: March 17, 2014

Respectfully submitted,

NATIONAL NURSES ORGANIZING COMMITTEE
LEGAL DEPARTMENT



Micah Berul
Counsel for Charging Party, NNOC

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

**CHARGING PARTY NATIONAL NURSES ORGANIZING COMMITTEE'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
[Case 10-CA-094646]**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: March 17, 2014



Tym Tschneaux